

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Kyle Johnson,
Petitioner

Case No. 2:21-cv-00707-APG-EJY

ORDER

v.

William Hutchings,¹ et al.,
Respondents

Petitioner Kyle Johnson, proceeding *pro se*, filed a federal habeas corpus petition under 28 U.S.C. § 2254. ECF No. 10. The respondents have filed a motion to dismiss the petition and a motion for leave to file exhibits under seal. ECF Nos. 16, 21. Johnson did not file an opposition to either motion. The respondents contend Grounds 1–3 must be dismissed as unexhausted or barred by *Tollett v. Henderson*, 411 U.S. at 267. ECF No. 16 at 3–4, 6–7. The respondents alternatively contend Ground 2 must be dismissed as conclusory. *Id.* at 4–6. I agree that Ground 1 is barred by *Tollett*, Ground 2 is conclusory, and Ground 3 is unexhausted. I will dismiss the petition.

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¹ According to the state corrections department's inmate locator page, Johnson is incarcerated at High Desert State Prison. The department's website reflects Calvin Johnson is the warden for that facility. https://doc.nv.gov/Facilities/HDSP_Facility/. I will therefore direct the clerk of the court to substitute Calvin Johnson for respondent William Hutchings under Rule 25(d) of the Federal Rules of Civil Procedure.

1 **I. Background**

2 **A. Proceedings on Initial Charges**

3 In 2017, Johnson was indicted in the Eighth Judicial District Court in Clark County,
 4 Nevada on 22 counts for crimes associated with four incidents. Ex. 12 and ECF No. 18-8 at 14–
 5 23. The first group of charges (Counts 1–5) alleged Johnson committed crimes at a U-Swirl
 6 restaurant on March 29, 2017. *Id.* at 15–16. The second group of charges (Counts 6–9) alleged
 7 Johnson committed crimes at an EZ Pawn on April 9, 2017. *Id.* The third group of charges
 8 (Counts 10–12) alleged Johnson committed crimes at a Family Dollar store on May 14, 2017. *Id.*
 9 at 16–17; *see also* Ex. 8 and ECF No. 18-4 at 5. The last group of charges (Counts 13–22)
 10 alleged Johnson committed crimes at a Mini Grand Prix on May 15, 2017. Ex. 12 and ECF No.
 11 18-8 at 17–23.

12 Johnson filed a pretrial petition for writ of habeas corpus alleging the State failed to
 13 establish at the grand jury proceeding probable cause for Counts 2 and 13–22 and that the
 14 kidnapping charge alleged in Count 2 was incidental to the robbery alleged in Count 3. Ex. 8 and
 15 ECF No. 18-4 at 7–12. The state district court denied that petition, finding the State satisfied the
 16 requisite burdens to hold Johnson to answer for the crimes. Ex. 15 and ECF No. 18–11. Johnson
 17 did not appeal the denial of that pretrial habeas petition.²

18 **B. Guilty Plea and Sentencing**

19 On February 21, 2019, Johnson pleaded guilty under an amended indictment and plea
 20 agreement to three charges: Count 1—robbery with the use of a deadly weapon at the Mini
 21

22 ² I take judicial notice of the online docket records of the Eighth Judicial District Court in Case
 23 No. C-17-325159-1 and Nevada Supreme Court Case No. 81366. The docket records of these
 courts may be accessed by the public online at
<https://www.clarkcountycourts.us/Portal/Home/Dashboard/29> and
<https://nvcourts.gov/Supreme/>.

1 Grand Prix; Count 2—conspiracy to commit robbery at the Mini Grand Prix; and Count 3—
2 robbery with use of a deadly weapon at the U-Swirl. Ex. 20 and ECF No. 18-16. The parties
3 stipulated to an aggregate term of imprisonment of 15-to-40 years (to run concurrent to Case
4 C325064). *Id.* at 2.

5 On April 4, 2019, the state district court sentenced Johnson to the stipulated aggregate
6 sentence of 15-to-40 years imprisonment as follows: Count 1: 4-to-10 years, with a consecutive
7 3-to-8 years for the use of a deadly weapon; Count 2: 1-to-4 years, to run consecutive to Count 3;
8 Count 3: 4-to-10 years, with a consecutive 3-to-8 years for the use of a deadly weapon, to run
9 consecutive to Count 1. Ex. 3 and ECF No. 17-3 at 10; Ex. 22 and ECF No. 18-18.

10 **C. Postconviction Proceedings**

11 Johnson did not directly appeal his convictions. *See supra* at n.2. He did, however, file a
12 motion to correct an illegal sentence in the state district court claiming the consecutive
13 enhancements for use of a deadly weapon constituted illegal sentences because the use of a
14 deadly weapon was a necessary element of the underlying robbery convictions. Ex. 26 and ECF
15 No. 18-22 at 3–5. On February 26, 2020, the state district court denied that motion because
16 Johnson had stipulated to the sentence imposed in his case. Ex. 31 and ECF No. 19-2 at 3.

17 On January 27, 2020, Johnson filed a state postconviction petition for writ of habeas
18 corpus in the state district court alleging: (1) ineffective assistance of counsel in violation of the
19 Sixth Amendment for failure to conduct an adequate pretrial investigation; (2) ineffective
20 assistance of counsel in violation of due process under the Fifth and Fourteenth Amendments for
21 failing to investigate and interview prospective witnesses; and (3) excessive bail in violation of
22 the Eighth Amendment’s proscription against cruel and unusual punishment. Ex. 27 and ECF
23 No. 18-23. The state district denied relief because Johnson failed to describe how counsel was

1 ineffective in failing to investigate and how additional investigation could have changed the
2 outcome of the case; failed to specify which witnesses counsel should have interviewed, the
3 content of each witness's testimony that counsel failed to uncover, and how each witness's
4 account would have favorably changed the outcome of the case; and failed to specify how bail
5 was excessive. Ex. 37 and ECF No. 19-8 at 3–6. The state district court further determined
6 Johnson had waived the excessive bail claim when he pleaded guilty, and (although not alleged)
7 that his sentence was not cruel and unusual because it was within the statutory limits. *Id.*

8 Johnson appealed the denial of his state habeas petition. Ex. 41 and ECF No. 19-12. He
9 alleged on appeal that for Counts 1-5, the state district court erred (1) in finding the evidence
10 sufficiently connected him to the crimes; (2) the grand jury proceeding was held without his
11 knowledge depriving him of the right to face his accuser; and (3) his attorney failed to provide
12 him with the identification lineup. *Id.* at 6–7. For Counts 9-11, Johnson alleged that the district
13 court erred in finding the evidence sufficient to connect him to the crimes. *Id.* at 7–9. Johnson
14 also asked the Supreme Court of Nevada to investigate why he was not notified regarding the
15 grand jury proceedings, to investigate why counsel did “could not get in touch with the victims
16 in regard to the charges,” and to dismiss the charges because he is wrongfully imprisoned for
17 crimes he did not commit. *Id.* at 9. The Nevada Court of Appeals affirmed the judgment after
18 declining to consider Johnson's claims because Johnson failed to present the factual allegations
19 made in his appeal to the district court during the district court's review of the habeas petition.
20 Ex. 43 and ECF No. 19-14 at 2.

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1 **II. Discussion**

2 **A. Motion for Leave to File Exhibits Under Seal**

3 The respondents moved for leave to file under seal a Presentence Investigative Report
 4 (PSI) dated March 19, 2019 as Exhibit 21. ECF Nos. 21; 22. Under Nevada law, the PSI is
 5 “confidential and must not be made a part of any public record.” Nev. Rev. Stat. § 176.156(5).
 6 There exists a compelling need to protect Johnson’s safety, privacy, and personal identifying
 7 information. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006).
 8 Accordingly, I will grant the motion for leave to file Exhibit 21 under seal (ECF No. 21).
 9 Exhibit 21 (filed at ECF No. 22-1) will remain under seal.

10 **B. Motion to Dismiss**

11 **1. Governing Standards**

12 The Antiterrorism and Effective Death Penalty Act (AEDPA) “places limitations on a
 13 federal court’s power to grant a state prisoner’s federal habeas petition.” *Hurles v. Ryan*, 752
 14 F.3d 768, 777 (9th Cir. 2014) (citing *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)). On habeas
 15 review, a federal court is limited to deciding whether a petitioner “is in custody in violation of
 16 the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); *e.g.*, *Estelle v.*
 17 *McGuire*, 502 U.S. 62, 67–68 (1991) (emphasizing that “[i]t is not the province of a federal
 18 habeas court to reexamine state-court determinations on state-law questions.”).

19 Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts
 20 (Habeas Rules) requires a federal habeas petition to specify all grounds for relief available to the
 21 petitioner and “state the facts supporting each ground.” Notice pleading is not sufficient to
 22 satisfy the specific pleading requirements for federal habeas petitions. *Mayle v. Felix*, 545 U.S.
 23 644, 655–56 (2005) (noting that Rule 8(a) of the Federal Rules of Civil Procedure requires only

1 “fair notice” while Habeas Rule 2(c) “is more demanding,” and mere legal conclusions without
2 facts are insufficient for habeas review); *see also Blackledge v. Allison*, 431 U.S. 63, 74 (1977)
3 (stating that “[t]he presentation of conclusory allegations unsupported by specifics is subject to
4 summary dismissal, as are contentions that in the face of the record are wholly incredible.”);
5 *accord Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995).

6 A petitioner must also exhaust state court remedies for a federal habeas corpus claim
7 before presenting that claim to the federal courts. 28 U.S.C. § 2254(b)(1)(A). The exhaustion
8 requirement ensures the state courts, as a matter of comity, will have the first opportunity to
9 address and correct alleged violations of federal constitutional guarantees. *E.g., Coleman v.*
10 *Thompson*, 501 U.S. 722, 730–31 (1991). To satisfy the exhaustion requirement, a claim must
11 have been raised through one complete round of either direct appeal or collateral proceedings to
12 the highest state court level of review available. *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45
13 (1999). “A petitioner has exhausted his [or her] federal claims when he [or she] has fully and
14 fairly presented them to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014)
15 (citing *O’Sullivan*, 526 U.S. at 844–45). Full and fair presentation requires a petitioner to
16 present the substance of his claim to the state courts, including a reference to a federal
17 constitutional guarantee and a statement of facts that entitle the petitioner to relief. *Scott v.*
18 *Schriro*, 567 F.3d 573, 582–83 (9th Cir. 2009) (citing *Picard v. Connor*, 404 U.S. 270, 278
19 (1971)). “In the exhaustion context, the Supreme Court has admonished lower courts that the
20 complete exhaustion requirement is not intended to ‘trap the unwary pro se prisoner.’” *Davis v.*
21 *Silva*, 511 F.3d 1005, 1009 n.4 (9th Cir. 2008) (quoting *Slack v. McDaniel*, 529 U.S. 473, 487
22 (2000)). “More generally, the Court has held pro se pleadings to a less stringent standard than
23 briefs by counsel and reads pro se pleadings generously, ‘however inartfully pleaded’.” *Davis*,

1 511 F.3d at 1009 n.4 (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam)). See
2 also *Sanders v. Ryder*, 342 F.3d 991, 999 (9th Cir. 2003) (noting *pro se* petitions are held to a
3 “more lenient standard than counseled petitions”). Although *pro se* pleadings must be liberally
4 construed, conclusory allegations unsupported by specific facts are subject to summary
5 dismissal. *Blackledge*, 431 U.S. at 74.

6 **2. Ground 1**

7 Ground 1 alleges there was insufficient evidence to establish probable cause for
8 Johnson’s arrest and or for the grand jury to hold him to answer to Counts 1–12, in violation of
9 due process guaranteed by the Fifth and Fourteenth Amendments. ECF No. 10 at 3–5. The
10 respondents contend Ground 1 must be dismissed because, among other reasons, it alleges only
11 claims of pre-plea error that are barred by *Tollett*. I agree.

12 In *Tollett*, the Supreme Court held that “[w]hen a criminal defendant has solemnly
13 admitted in open court that he is in fact guilty of the offense with which he is charged, he may
14 not thereafter raise independent claims relating to the deprivation of constitutional rights that
15 occurred prior to the entry of the guilty plea.” 411 U.S. at 267. Therefore, “[a]s a general rule,
16 one who voluntarily and intelligently pleads guilty to a criminal charge may not subsequently
17 seek federal habeas relief on the basis of pre-plea constitutional violations.” *Hudson v. Moran*,
18 760 F.2d 1027, 1029–30 (9th Cir. 1985) (citations omitted). A criminal defendant who pleads
19 guilty (or no contest, which is the equivalent of a plea of guilty) “may only attack the voluntary
20 and intelligent character of the guilty plea” (*Tollett*, 411 U.S. at 267) by showing that the advice
21 he received from counsel was not “within the range of competence demanded of attorneys in
22 criminal cases.” *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970).

1 Johnson's claims that police lacked probable cause to arrest him, and that the State failed
2 at the grand jury proceeding to establish sufficient cause to hold Johnson to answer for Counts 1–
3 12, involve pre-plea motions or petitions. They do not attack the voluntary and intelligent
4 character of Johnson's guilty plea by alleging that the advice he received from his trial counsel
5 was inadequate. Johnson's guilty pleas preclude federal habeas relief for the pre-plea violations
6 he alleges in Ground 1 of the petition. *Tollett*, 411 U.S. at 267; *Hudson*, 760 F.2d at 1030. I
7 therefore dismiss Ground 1 as not cognizable under 28 U.S.C. § 2254.

8 **3. Ground 2**

9 In Ground 2, Johnson alleges counsel was ineffective in violation of the Sixth
10 Amendment by failing to investigate or prove that the evidence presented against Johnson was
11 incorrect or false. ECF No. 10 at 7. The respondents contend Ground 2 should be dismissed as
12 conclusory because it lacks specific facts as to what counsel should have done to provide
13 effective assistance. Thus, Johnson fails to adequately plead a claim of ineffective assistance of
14 counsel. ECF No. 16 at 5–6. I agree.

15 Johnson does not provide specific allegations identifying what investigation counsel
16 should have performed to prove the evidence against him was false or incorrect, what counsel
17 would have discovered had counsel performed such an investigation, or how there would exist a
18 reasonable probability the result of the proceedings would have been different had counsel
19 conducted such an investigation. Johnson's attaches to his petition reports and documents
20 generated by police during the investigation of his case that are favorable to his view of the
21 evidence against him. But they do not establish the specific allegations of deficient performance
22 and prejudice required to allege that counsel was ineffective in failing to investigate. I will
23 therefore dismiss Ground 2 as conclusory.

